

GARY K. NELSON, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

March 14, 1969

DEPARTMENT OF LAW OPINION NO. 69-10 (R-66)

REQUESTED BY: CHARLES D. HADLEY
Executive Secretary
Arizona Corporation Commission

QUESTION: Must a public service corporation doing business in the State of Arizona comply with the requirements of A.R.S. § 40-302 in issuing stocks and stock certificates, bonds, notes and other evidences of indebtedness payable at periods of more than twelve months after the date of issue when such corporation is a foreign corporation and is also engaged in interstate commerce with an intrastate operation?

ANSWER: No.

The basis for the prima facie jurisdiction of the Arizona Corporation Commission over public service corporations in the issuance of stocks and stock certificates, bonds, notes and other evidences of indebtedness, is contained in A.R.S. §§ 40-301 - 40-303. The pertinent parts of these sections are as follows:

A.R.S. § 40-301:

"A. The power of public service corporations to issue stocks and stock certificates, bonds, notes and other evidences of indebtedness, and to create liens on their property

located within this state is a special privilege, the right of supervision, restriction and control of which is vested in the state, and such power shall be exercised as provided by law and under rules and regulations the commission prescribes.

"B. A public service corporation may issue stocks and stock certificates, bonds, notes and other evidences of indebtedness payable at periods of more than twelve months after the date thereof * * *.

"C. Prior to such issuance, a public service corporation shall secure an order from the corporation commission as specified in § 40-302."

A.R.S. § 40-302:

"A. Before a public service corporation issues stocks and stock certificates, bonds, notes and other evidences of indebtedness, it shall first secure from the commission an order authorizing such issue * * *.

* * *

"D. A public service corporation may issue notes for proper purposes and not in violation of law payable at periods of not more than twelve months after date of issuance, without consent of the commission, but no such note shall, wholly or in part be refunded by any issue of stocks or stock certificates,

Opinion 69-10
(R-66)
March 14, 1969
Page Three

bonds, notes or any other evidence of indebtedness without consent of the commission* * *."

A.R.S. § 40-303:

"A. All stock and every stock certificate, and every bond, note or other evidence of indebtedness of a public service corporation, issued without a valid order of the commission authorizing the issue, * * *, is void, * * *."

It appears, at least on the face of the aforesaid statutes, that the Commission has jurisdiction over all public service corporations in the issuance of stocks and stock certificates, bonds, notes and other evidences of indebtedness. Unquestionably, these statutes give the Commission such jurisdiction over domestic public service corporations. The question is whether the statutes also give the Commission jurisdiction over securities issuance by foreign public service corporations. The Supreme Court of Arizona has never passed on the validity of the aforesaid statutes with respect to foreign public service corporations engaged in interstate commerce.

Courts which have had to decide the issue of whether a public utilities commission has jurisdiction over the issuance of securities by foreign corporations have generally held that the commission does not have such jurisdiction.

In Southern Sierras Power Co. v. Railroad Commission, 205 Cal. 479, 271 P. 747 (1928), the court held that the

Opinion No. 69-10

(R-66)

March 14, 1969

Page Four

commission had no authority under the California statutes to authorize the issuance of stock by a Wyoming corporation engaged in supplying electrical power in California. The California statute provided that the power of public utilities to issue stocks and stock certificates or other evidence of interest or ownership and bonds, notes and other evidences of indebtedness, and to create liens on their property situated within the state was a special privilege, the right of supervision and regulation over which was vested in the state to be exercised by the Railroad Commission under such rules and regulations as it may prescribe. The court stated that while the language employed in the statute was broad and comprehensive and made no distinction in express terms between foreign and domestic corporations, it was never intended thereby to subject foreign corporations to regulation concerning the exercise of the inherent corporate powers conferred upon them by the legislative power of the incorporating state. The court pointed out that a statute of a state granting powers and privileges to corporations must, in the absence of plain indications to the contrary, be held to apply only to corporations created by the state and over which it has the power of visitation and control. The court, recognizing that a legislature has power to dictate under what terms and conditions foreign corporations may transact business within the state, stated that such power does not extend so far as to give the legislature power to regulate or control the acts of such corporations concerning their internal affairs. The issuance of stock by a corporation, the court pointed out, is purely an internal affair.

In Public Service Commission v. Union Pacific Railway Company, 271 Mo. 258, 197 S.W. 39 (1917), it was held that the Missouri statutes were not applicable so as to require authorization by the public service commission of a proposed issue of bonds by the Union Pacific Railway Company which was incorporated under the laws of another state. The statutes provided in part that the power of public utility corporations to issue stocks and bonds, notes and other evidences of indebtedness,

Opinion No. 69-10
(R-66)
March 14, 1969
Page Five

was a special privilege, the right of supervision, regulation, restriction and control of which was vested in the state to be exercised under rules and regulations prescribed by the commission. The court held that the statute necessarily referred to domestic corporations for the reason that the entire authority of a foreign corporation to issue shares and stock arose out of and was limited to the terms of the charter granted to it by the state where it was created.

The State of Illinois, at the time of the decision in Missouri Pacific Railroad Co. v. Public Utilities Commission, 292 Ill. 427, 127 N.E. 41 (1920), had a statute very similar to the statute in Missouri and referred to in the Union Pacific case, supra. The Illinois court considered the reasoning of the Missouri court in the Union Pacific case to be sound and therefore concluded its statute did not apply to foreign corporations. The court stated that the supervision, regulation, restriction and control imposed by the Public Utilities Act was directed, not to the sale of securities within this state, but to the issuance of securities, corporate acts which corporations can only consummate in the states where they are organized and domiciled. Hence, the court held that part of the statute was void when applied to a foreign corporation.

Re Fryeburg Water Co., 79 N.H. 123, 106 A. 225 (1919), held that the New Hampshire statute conferring upon the public service commission power to control the issuance of stock by corporations doing business in the state should not be construed to apply to foreign corporations. The court said that, although the language of the statute was sufficiently broad to include within its provisions foreign corporations, it was not to be presumed that the legislature intended to give the commission power to regulate the internal affairs of such corporation. The court pointed out that if the amount of capital stock was limited by the act of incorporation, the legislature of another state where the corporation happened to be engaged in business had no power to increase or diminish the amount of stock. The court stated further that a water

Opinion No. 69-10
(R-66)
March 14, 1969
Page Six

company which was a public utility incorporated under the laws of another state should not apply to the public service commission of New Hampshire for approval of stock dividends.

In United Airlines, Inc. v. Ill. Commerce Commission, 32 Ill.2d 516, 207 N.E.2d 433 (1965), the Illinois statutes authorized a public utility to issue stocks and other securities provided the utility "shall first have secured from the commission an order authorizing such issue". The statute further provided an exemption from such requirement for foreign corporations under certain circumstances. (Prior to the amendment to the Illinois statute which provided the exemption the Illinois statutes were similar to the Arizona statutes and Missouri Pacific Railroad Co. v. Public Utilities Commission, supra, held not to be applicable to foreign corporations.) The court, in discussing the issue of whether the commission had jurisdiction to regulate the issuance of the securities by United Airlines, Inc., a foreign corporation engaged in interstate commerce, concluded that it did not, since such regulation imposed an undue burden on interstate commerce. The court said that the power given the commission to approve or disapprove the issuance of stocks and securities necessarily affected United's interstate activities, for if United could not secure funds through the sale of its stocks and securities, its continued existence might be jeopardized. The court stated that if Illinois could exercise the power to approve or disapprove the issuance of United's securities, because it transacted business in Illinois, that each of the other sixteen states where United provided intrastate service could likewise exercise power to approve or disapprove the issuance of such securities. The court pointed out that this would result in a total of seventeen jurisdictions asserting the power to approve or reject any issuance of stock proposed by United and that the task of seeking and gaining approval from such a number of states would be unjustifiably expensive, time consuming and burdensome, and would create delay which would directly impair the usefulness of United's facilities for interstate traffic. The court went on to state that each independent regulating authority would apply locally defined standards of public interest and locally defined rules in order to approve or disapprove a single issuance of

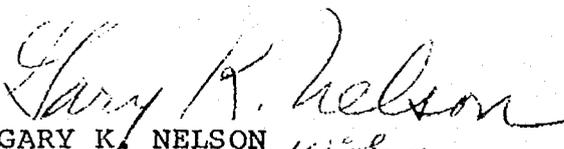
Opinion No. 69-10
(R-66)
March 14, 1969
Page Seven

securities and that the result would be chaotic. The court pointed out that the issuance of securities was a single indivisible act and that it could not be fractionalized and given portions allocated to specific states.

It is readily apparent from the holdings in the above cases that under the statutes of the respective states it was never intended by the legislatures to subject foreign corporations to the jurisdiction of public utility commissions in the issuance of securities. It cannot be presumed that the legislature intended to give the commission such power in the absence of such a statute and express words to that effect. Such position is buttressed by the fact that in the Southern Sierras, Fryeburg, Union Pacific and Missouri Pacific cases it was stated that though the language of the statute was sufficiently broad to include within its provision foreign corporations, it was not to be presumed that the legislature intended to give the commission such power, and in the absence of plain indications to the contrary, such statutes applied only to domestic corporations.

The pertinent parts of the Arizona statutes are almost verbatim to those which were interpreted in the aforesaid cases and therefore should receive a similar construction. Hence, a foreign corporation engaged in interstate commerce need not secure the consent or approval of the Arizona Corporation Commission to issue stocks and stock certificates, bonds, notes and other evidences of indebtedness.

Respectfully submitted,


GARY K. NELSON *w.e.*
The Attorney General

GKN:th